

DECISION



18894 melody PLm
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-200313

DATE: **JUL 23 1981**

MATTER OF: Jekyll Towing & Marine Services Corp.

DIGEST:

1. Although agency should have limited its request for extension of proposal acceptance date to sole offeror within competitive range, fact that request was inadvertently made to all offerors did not prejudice protester nor impact award selection. Agency did not act improperly by conducting discussions with and requesting best and final offer from only offeror within competitive range and not from other unacceptable offerors.
2. Since protester's proposal was determined technically unacceptable and outside competitive range its price was irrelevant and therefore agency would have no reason to disclose protester's price to sole acceptable offeror.
3. While protester alleges that agency fraudulently misrepresented status of vessel in application to Coast Guard for waiver of certification for vessel of prospective awardee and although it appears that agency supplied wrong vessel number, record contains no evidence that agency acted fraudulently or improperly.
4. Contention that awardee's vessel is not capable of cruising speed required by RFP raises matter relating to contract administration, which GAO will not review under Bid Protest Procedures.
5. Protest against inclusion of various RFP requirements and exclusion of others is untimely and not for consideration since presence or absence of requirements was clear from reading RFP but protest was not filed prior to closing date for submission of proposals.

[Protest of Navy Contract Award]

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6. Fact that agency expressed reservations as to adequacy of protester's vessel despite several complete deck plans in its possession does not constitute sufficient evidence that agency is carrying out vendetta against protester.

Jekyll Towing & Marine Services Corp. (Jekyll) protests the award of a contract by the Military Sealift Command, Department of the Navy (Navy), to Sea Research and Development Services, Inc. (SRD), under request for proposals (RFP) No. N0003380R0066.

This solicitation, issued August 1, 1980, sought proposals to furnish a U.S. flag support vessel for use in conducting offshore sonar calibration tests. Performance was scheduled for a period of approximately seven days, to commence during the latter part of August 1980. Vessels were to be 100 or more feet in length and capable of 14 knots. The RFP further required that vessels be Coast Guard certified, although uncertified vessels would be considered if no satisfactory certified vessels were offered and the Coast Guard agreed to waive the vessel inspection laws in the interest of national defense. August 8 was designated the closing date for submission of proposals which were to be held firm through midday, August 12. Five offers were timely received, priced as follows:

<u>Offeror (Vessel)</u>	<u>Rate Per Day</u>
Jekyll (<u>Jekyll Isle</u>)	\$1,758
SRD (<u>Miss Juanita</u>)	\$1,800*

* (reduced to \$1,750 in best and final offer)

Tracor Marine, Inc. (<u>G.W. Pierce</u>)	\$1,950
Ocean Operators, Inc. (<u>Venture</u>)	\$2,030
University of Delaware (<u>Cape Henlopen</u>)	\$2,190

Although Jekyll was the low offeror and the Jekyll Isle was the only Coast Guard certified vessel offered, it was only 76 feet long and capable of only 11.3 knots, and thus failed to satisfy the RFP's operational requirements. Similarly, while the Venture and G.W. Pierce both met the 100 foot length requirement, neither was capable of 14 knots. Since the offers of Jekyll, Tracor Marine, Inc., and Ocean Operators, Inc. were thus all deemed unacceptable and because it was later learned the Cape Henlopen would not be available for the contract, the Navy determined that only SRD's Miss Juanita could meet its requirements and remained in the competitive range. By telegram of August 11, the Navy requested the Coast Guard to waive its certification requirement to enable the Miss Juanita to perform. No reply was received by midday, August 12, however and all offerors were asked, and agreed, to keep their offers open through August 13. On the morning of August 13, the contracting officer, anticipating the waiver would be forthcoming, requested SRD's best and final offer in response to which SRD offered a revised price of \$1,750. The Coast Guard waiver was apparently granted later that day and the Navy accepted SRD's revised offer soon thereafter. The agency reports that the charter was satisfactorily performed during the period August 16 through August 24.

Jekyll raises numerous objections to this procurement, primarily alleging that the agency engaged in fraud and collusion to assure that SRD, and not Jekyll, would receive the award. This allegation stems from Jekyll's perception (based on its examination of the Navy's procurement file) that even though all offerors had agreed to keep their offers open an extra day, only SRD was asked for its best and final offer. Jekyll maintains that all offerors

should have been afforded an equal opportunity to modify their prices and terms, and reasons that the agency "was setting things up for SRD to come back with another bid at a lower rate than Jekyll's." That such was the case, Jekyll suggests, is evidenced by the fact that SRD's best and final offer was eight dollars lower than Jekyll's offer, a coincidence which Jekyll believes also indicates SRD was "tipped off" as to Jekyll's price.

The remaining allegations relate in large part to the Navy's refusal to restrict special project charters to vessels possessing Coast Guard certification, and to the legitimacy of the agency's minimum speed and length requirements. Many of these issues were discussed in a prior protest by Jekyll, which also challenged the Navy's special project chartering procedures. See Jekyll Towing & Marine Services Corp., B-199199, December 2, 1980, 80-2 CPD 413. The protester concludes that the Navy's contracting practices are undermining the competitive procurement process. For the reasons set forth below, we deny the protest.

It appears from the record that Jekyll's principal contention--the Navy engaged in fraudulent conduct designed to assure an award to SRD--is based on a misunderstanding caused by the Navy's August 12 request to all offerors that they extend the proposal acceptance period one day. The agency now explains that this request was inappropriate since it had determined prior thereto that only the Miss Juanita met its speed and length specifications as well as the other operational requirements in the RFP. Indeed, it notes, the extension was necessary in the first place only because the Coast Guard delayed in responding to the Navy's request that the certification requirement be waived for the Miss Juanita. The agency thus concedes that since only SRD's proposal was technically acceptable, only that firm should have been contacted for an extension, and that Jekyll and the other offerors should have been notified that their proposals were unacceptable because their vessels did not conform to the RFP specifications. It submits,

however, that the actions complained of were inadvertent, not fraudulent, and clearly had no bearing on the outcome of the procurement. We find nothing in the record to contradict the agency's explanation and we agree that the erroneous notification did not affect the procurement's outcome.

Since the agency had determined that only SRD could meet its requirements, we also find nothing objectionable in its request for only that firm's best and final offer. Where, in a negotiated procurement, a proposal such as that submitted by Jekyll is determined to be technically unacceptable and therefore not within the competitive range, the agency has no duty to hold discussions with that offeror. On the other hand, it is quite proper for the agency to hold discussions with an offeror such as SRD whose offer was technically acceptable and within the competitive range. See Radix II, Inc., B-184913, January 22, 1976, 76-1 CPD 37. In this regard, the regulation only requires that written or oral discussions be held with offerors who submit proposals within a competitive range. Defense Acquisition Regulation (DAR) § 3-805.1 (DPC # 76-7, April 29, 1977). Finally, the mere fact that SRD's best and final offer was only eight dollars below Jekyll's does not by itself support a conclusion that SRD was "tipped off" as to Jekyll's price. This is particularly so under the instant circumstances: Jekyll's proposal was found to be technically unacceptable, thus its lower price was irrelevant since that proposal could not be considered for award. Decision Sciences Corporation, B-199527, December 15, 1980, 80-2 CPD 430. The Navy therefore had no motive to seek a lower price from SRD other than a desire to achieve the lowest price for the Government. We find no other evidence of improper conduct by the agency.

Jekyll also suggests the possibility of fraud by the Navy in connection with its August 1980 telegram to the Coast Guard requesting a waiver of certification for the Miss Juanita. In that telegram, Jekyll alleges, the agency "did wrongfully represent the Miss Juanita as a vessel possessing an Official Number, 532005," with the possible intention of misleading the Coast Guard as to the vessel's status.

In this regard, Jekyll claims that at the time of this procurement, the Miss Juanita was registered in the State of Florida as a motor boat named Merganser but was not registered with the Coast Guard. As such, the vessel was not qualified to engage in coastal trade. The Navy responds that inclusion of the official number must have resulted from a clerical error, since SRD never indicated its vessel possessed such a number. Further, the agency strongly denies that it included the number for the purpose of misleading the Coast Guard.

Although it does appear that the Navy supplied the wrong number to the Coast Guard, the record nonetheless contains no evidence that the Navy acted fraudulently or otherwise improperly with regard to its telegram to the Coast Guard.

Jekyll also claims that the Miss Juanita was incapable of maintaining the required 14 knot cruising speed and thus, should have been found technically unacceptable. SRD represented in its proposal, however, that the Miss Juanita was capable of the 14 knot speed, and the Navy states it had no reason to doubt this representation, particularly in view of the vessel's successful completion of prior similar contracts. Upon receiving the contract award, SRD thus became bound to perform in accordance with the 14 knot specification, and its failure to do so would constitute grounds for termination. Whether the Miss Juanita in fact performed in accordance with the 14 knot requirement is a matter for resolution by the contracting parties, however, and will not be considered under our Bid Protest Procedures. See AR&S Enterprises, Inc., B-197303, July 8, 1980, 80-2 CPD 17.

The protester next raises several allegations concerning Coast Guard certification and the speed and length requirements in the RFP. They are as follows:

1. Coast Guard certification should have been the principal evaluation factor in the solicitation;

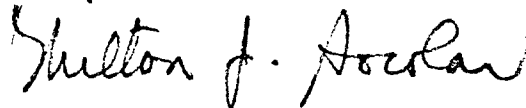
2. the Navy should require that licensing and Coast Guard certification documentation be submitted along with proposals in order to assure that offered vessels are as represented;
3. the 100 foot length and 14 knot speed requirements are unnecessary and thus overly restrictive; and
4. if the agency insists on a 14 knot speed, it should conduct trials in order to assure that offerors have not misrepresented their vessels' capability.

All of these protest allegations are untimely and thus not for consideration on the merits. Our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1980), require that protests based upon alleged improprieties apparent on the face of a solicitation be filed prior to the closing date for submission of proposals. These issues all concern requirements the presence or absence of which was clear from reading the solicitation. In order to be deemed timely filed, therefore, these issues should have been raised prior to the August 8 closing date. Jekyll's protest was not received in our Office until September 10.

Jekyll also believes that it may be the victim of a "vendetta" carried out by the Navy in retaliation against Jekyll's earlier protest of that agency's procurement practices. This belief apparently stems from the fact that the agency has questioned the sufficiency of the enclosed deck space on the Jekyll Isle despite the fact that, according to Jekyll, complete deck plans for this vessel have been submitted to the contracting officer on several prior occasions. The Navy denies this allegation, pointing out that Jekyll's protests have in fact convinced the Navy to reevaluate its minimum operational requirements. As a result, the 100 foot minimum length requirement has been omitted and the 14 knot speed requirement reduced to 12 knots in more recent solicitations. The record here contains no proof, beyond Jekyll's speculation, that the Navy has treated Jekyll in any unfair or improper manner.

The mere fact that the agency may have expressed reservations as to the adequacy of enclosed deck space on the protester's vessel certainly does not satisfy the protester's burden of proving the truth of its allegation. In any event, Jekyll's proposal was not rejected on this basis but for failure to meet the size and speed requirements. Further, it appears that the Navy has actually heeded Jekyll's protests to some extent as evidenced by the easing of its operational requirements, although we understand that the Jekyll Isle still will not meet the reduced speed requirement.

The protest is denied in part and dismissed in part.

A handwritten signature in dark ink, appearing to read "Shilton J. Acosta". The signature is fluid and cursive, with the first name "Shilton" being more prominent and the last name "Acosta" following in a similar style.

Acting Comptroller General
of the United States